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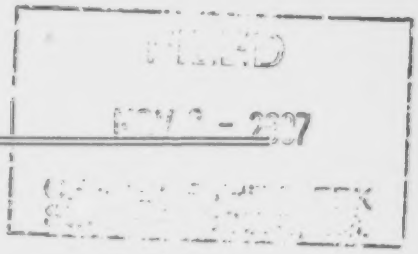

In The

Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

COREY RAMONE FRAZIER,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

REPLY BRIEF FOR PETITIONER

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Pursuant to Supreme Court Rule 15.6 Petitioner submits the following reply to Respondent's brief in opposition to the State of Michigan's petition for certiorari.

The refusal of the Michigan Supreme Court to reinstate Respondent's convictions is inimical to our system of justice.

Under Respondent's "Jurisdiction" heading, p 1, Respondent inaccurately states that the Michigan Supreme Court did not decide a federal question or affect a decision of the federal court. On the contrary, the Michigan Supreme engaged in a nine page intellectual legal analysis in determining that the federal court's *habeas* decision concerning Respondent's Sixth Amendment ineffective assistance of counsel claim was constitutionally infirm. [Appendix 9a-17a]

Respondent mistakenly contends the petition should be denied because it seeks relief for the first time from an interlocutory order entered by the trial court. [See p 5, 14] While this case does involve an interlocutory appeal, it must be kept in mind that it gets its life from a constitutionally infirm federal district court conditional grant of *habeas corpus*. Reinstatement of Respondent's convictions is appropriate notwithstanding the claim that the interlocutory review posture of this case should be a consideration in deciding whether or not to grant certiorari. Michigan is among those states enacting laws partially abrogating the finality requirement and giving the government the right to appeal orders granting new trials in criminal cases. See *People v Torres*, 452 Mich 43 (1966) discussing MCL 770.12. See also *State v Walker*, 887 P2d 971 (Alaska App. 1994). Quite unlike *Virginia Military Institute v United States*, 508 US 946 (1993) the questions presented in this case are ripe for review. A decision by this Court in favor of Petitioner will eliminate the conducting of an unnecessary retrial. On the other hand, conducting a retrial will render moot the very important issues that this case presents.

The petition filed herein is to the Michigan Supreme Court from its final judgment entered in *People v Frazier*, 478 Mich 231 (2007) [Appendix 1a-44a] denying Petitioner's request to reinstate Respondent's convictions.

Respondent's reliance on the Michigan Supreme Court's forfeiture discussion as a ground for not entertaining the petition is not well taken. [p 6] The Michigan Supreme Court routinely deviates from its procedural default policy. [See Pet. p 11 and citations]

Respondent seeks to preclude Petitioner from obtaining review of important federal questions relying on the Michigan Attorney General's failure to seek Sixth Circuit Court of Appeals review of the *Frazier v Berghuis* decision. [2003 WL 25195212] Petitioner maintains that the policy rationale of the forfeiture argument should not apply in a case such as this where the federal court decision requiring a retrial is constitutionally infirm.

Modern decisions such as *Kane v Town of Harpswell*, 254 F3d 325 (1st Cir. 2001) are enlightening. There the court relates that the purpose of issue preclusion doctrine is to prevent a party from relitigating an issue where there has been full and fair litigation, *including* an opportunity to appeal; indeed where an appeal on an issue is unavailable for reasons beyond the control of the losing party, preclusive effect may be denied. *Nutter v Monongahela Power Co.*, 4 F3d 319, 321-22 (4th Cir. 1993); Restatement sec. 28(1); see also *Beale v Chisholm*, 626 A2d 345, 347 (Me 1993). The court further explains that direct review of the erroneous original decision cannot be precluded because, in the meantime, the original court has repeated the error in the same case or other courts have adopted it by cross reference, citing *Livera v First National State Bank*, 897 F2d 1186, 1190-91 (3d Cir.), *cert. denied*, 493 US 937 (1989).

The Court in *Nutter v Monongahela Power Co.*, *supra*, said that federal law determines the preclusive effect of federal orders on questions of federal law regardless of whether the court applying the federal judgment is state or federal. *Travelers Indem. Co. v Sarkisian*, 794 F2d 754, 761, n. 8 (2d Cir.), *cert. denied*, 479 US 885 (1986); *Seven Elves Inc. v Eskerazi*, 704 F2d 241, 243-44, n. 2 (5th Cir. 1983); 18 Charles A. Wright, et al, Federal Practice and Procedure, sec. 4468, at 656-57 (1981). "Under contemporary principles of collateral

estoppel," the unavailability of appellate review "strongly militates against giving" a judgment preclusive effect. *Standefer v United States*, 447 US 10, 23 (1980); See also *Hussein v Oshkosh Motor Truck Co.*, 816 F2d 348, 356 (7th Cir. 1987); Restatement (Second) of Judgments sec. 28(1) (1982). While the availability of appellate review is not "always an essential predicate of estoppel," *Standefer*, 447 US at 23, n. 18, see *Johnson Steel St. Rail Co. v William Wharton Jr. & Co.*, 152 US 252, 256-57 (1984); *Federal Trade Comm'n v Food Town Stores, Inc.*, 547 F2d 247, 249 (4th Cir. 1977), Petitioner submits that where the Genesee County Prosecutor is not in control of a case on *habeas corpus* review, the failure of the Michigan Attorney General to seek appellate review should not preclude review by this Court of issues raised by the prosecutor and decided by the Michigan Supreme Court that are of major significance to the jurisprudence of the nation. *Res judicata* should not apply in a case such as this where the prosecutor was not adequately represented in federal court and did not have the opportunity to participate in that action. *cf.*, *Batzel v Smith*, 372 F Supp 2d 546 (2005).

Respondent's contention that this case is not appropriate to review application of the law-of-the-case doctrine or *res judicata* doctrine to *habeas corpus* decisions is not compelling. [p 10-13]

This Court has said that "[f]ederal *habeas* review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Calderon v Thompson*, 523 US 538, 555-56 (1998). For this reason, federal *habeas* review of state court judgments is limited. As this Court observed in *Calderon*: In light of "the profound societal costs that attend the exercise of habeas jurisdiction, (citations omitted) we have found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief. See, e.g., *McCleskey v Zant*, 499 US 467 (1991). This Court added that "[t]hese limits reflect our enduring respect for "the State's interest" in the finality of convictions that have survived direct review within the state court system. *Id.*, at 555 (citations omitted).

The interest of preserving the finality of criminal convictions is of paramount importance in the *habeas* context. See, e.g., *Woodford v Garceau*, 538 US 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences . . . and to further the principles of comity, finality, and federalism." (internal quotation marks omitted)). A similar interest drives the law-of-the-case and the mandate rules – the need for litigation to finally come to an end. See *Klay v All Defendant's*, 389 F3d 1191, 1199 (11th Cir. 2004). ("While not an inexorable command, the law-of-the-case doctrine provides stability and finality in litigation, which are crucial cornerstone values for developing a just and efficient judicial process."); *United States v O'Dell*, 320 F3d 674, 679 (6th Cir. 2003).

While Respondent seeks to distinguish the case *sub judice* from cases such as *Kremer v Chem. Constr. Corp.*, 456 US 461 (1982) Respondent fails to address petitioner's argument that a constitutionally infirm decision cannot have the preclusive effect of *res judicata*. [Pet. p 25-26]

Rule 14 provides that the statement of questions presented in the petition is deemed to comprise every subsidiary question fairly included therein. Petitioner maintains that notwithstanding the Michigan Supreme Court's forfeiture discussion and *res judicata* application to deny petitioner's request to reinstate Respondent's convictions, the Michigan Supreme Court decided important questions of federal law that have not been settled by this Court.

Respondent's claim that the 84-year-old decision in *Collins v Loisel*, 262 US 426 (1923) should control the case *sub judice* must be rejected by this Court. [p 10] Here is why.

April 24, 1996 is the effective date of AEDPA. The Court in *Webb v Warden*, 2003 WL 22480186 (Conn. Super.) (Unpublished) states that notwithstanding the venerable history of the writ that there are definite limitations upon the right of a person to obtain relief pursuant to a petition for a writ of *habeas corpus*. That is, at common law, a prisoner could file multiple and repeated

petitions for a writ of *habeas corpus*, the doctrine of *res judicata* being inapplicable.

"[A] renewed application could be made to every other judge or court in the realm, and each court or judge was bound to consider the question of the prisoner's right to a discharge independently, and not to be influenced by the previous decisions refusing discharge." W. Church, Writ of *Habeas Corpus*, sec. 386, p 570 (2nd edition 1893). This was permissible because, at common law, there was no right to appellate review of a denial of a petition for a writ of *habeas corpus*; consequently, successive writs served as a substitute for the right to a petitioner to appeal.

The court further explains that the development of review of the decision on *habeas corpus* decisions caused some courts during the early part of the 20th century to question the viability of the common-law rule. In fact some States, notably Georgia [see *Perry v McLendon*, 62 Ga. 598 (1979)], South Dakota, [see *McMahon v Mead*, 30 S.D. 515 (1912)] and Wisconsin [see *ex parte Heller,* 146 Wis. 517 (1911)], completely rejected the common-law rule and applied the doctrine of *res judicata* to denials of *habeas* petitions. The court further explains that federal court's reaffirmed that while the doctrine of *res judicata* did not apply to *habeas* petitions, with the advent of the right to appeal adverse decisions on habeas petitions, the common-law rule of endless petitions was modified. *Salinger v Loisel*, 265 US 224 (1924). Thus began a long series of cases and legislative changes culminating in the decision of the Supreme Court in *McCleskey v Zant*, 499 US 467 (1991). The court explains that modernly, now, at least in the federal arena, while the actual doctrine of *res judicata* does not really apply, successive and abusive petitions for writs of *habeas corpus* may nonetheless be dismissed.

In light of the above-referenced discussion, the case *sub judice* presents the legitimate question of whether the doctrine of *res judicata* should have been applied by the Michigan Supreme Court to deny Petitioner's request to reinstate Respondent's convictions.

There is a need to clarify the *res judicata* effect to *habeas corpus* judgments. As stated by Justice Brennan thirty-seven years ago in *Chambers v Cox*, 400 US 870 (1970) "It is an issue which will not go away . . . " Even the Michigan Supreme Court is not certain of the answer to the question and this is demonstrated by its mere reference to the 123-year-old Florida Supreme Court decision in *Kurtz v State*, 22 Fla 36, 45 (1886) where the Michigan Supreme Court said that "the principle of *res adjudicata* [**seems to be**] applicable . . . " [See Pet. App. p 11a]

Petitioner submits that pre-ADEPA *habeas corpus* decisions should not control the outcome of the case *sub judice*.

Respectfully submitted,

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Date: November 8, 2007